Supreme Court, U.S.
FILED
DEC 28 2010
OFFICE OF THE CLERK

No. 10-517

In The Supreme Court of the United States

INDAH ESTALITA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Reply Brief 1

I. The Circuits Are Divided on Whether the BIA May Refuse to Consider the Merits of a Departed Noncitizen's First, Timely Motion to Reopen or Reconsider 2

A. This Court Routinely Reviews Unpublished Decisions Implicating Circuit Splits 2

B. Four Other Circuits' Decisions Conflict with Those of the First and Tenth Circuits and Would Require the BIA to Consider Petitioner's Motion to Reopen 3

II. The Tenth Circuit Erred in Upholding the Post-Departure Bar 9

III. This Case Is an Ideal Vehicle 10

Conclusion 14

TABLE OF AUTHORITIES

Page

CASES

Contreras-Bocanegra v. *Holder*, No. 10-9500, 2010 WL 5209228 (10th Cir. Dec. 23, 2010).....3

Coyt v. *Holder*, 593 F.3d 902 (9th Cir. 2010).....6, 7

Dada v. *Mukasey*, 554 U.S. 1 (2008).....1, 9, 10

Lin v. *Gonzales*, 473 F.3d 979 (9th Cir. 2007).....7

Madrigal v. *Holder*, 572 F.3d 239 (6th Cir. 2009).....6, 7, 11

Marin-Rodriguez v. *Holder*, 612 F.3d 591 (7th Cir. 2010).....*passim*

Matter of Armendarez-Mendez, 24 I.&N. Dec. 646 (BIA 2008).....5

Matter of Manneh, 16 I.&N. Dec. 272 (1977).....13

Matter of Roussis, 18 I.&N. Dec. 256 (1982).....14

Matter of Veliz-Payes, File: A070-569-618 – Baltimore, Md., 2008 WL 4222186 (BIA Aug. 29, 2008).....6

Matter of Yauri, 25 I.&N. Dec. 103 (2009).....12

MedImmune, Inc. v. *Genentech, Inc.*, 549 U.S. 118 (2007).....7

Pena-Muriel v. *Gonzales*, 489 F.3d 438 (1st Cir. 2007).....7, 8

Rosillo-Puga v. *Holder*, 580 F.3d 1147 (10th Cir. 2009), *cert. denied*, 131 S. Ct. 502 (2010).....2, 3, 8

Sadhvani v. *Holder*, 596 F.3d 180 (4th Cir. 2009).....5

TABLE OF AUTHORITIES – Continued

Page

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 9

Union Pac. R.R. Co. v. *Bhd. of Locomotive Eng'rs*, 130 S. Ct. 584 (2009) 3

William v. *Gonzales*, 499 F.3d 329 (4th Cir. 2007) 4, 5

Zhang v. *Holder*, 617 F.3d 650 (2d Cir. 2010) 5

STATUTES AND REGULATIONS

8 C.F.R. §1003.2(d) ..... *passim*

8 C.F.R. §1003.4 ..... 6, 7

8 C.F.R. §1245.2(a)(1)(i) 12

8 C.F.R. §1245.2(a)(1)(ii) 11, 12, 13

8 U.S.C. §1229a(c)(7)(C)(iv)(IV) 10

Immigration and Nationality Act (INA) §212, 8 U.S.C. §1182 13

Immigration and Nationality Act (INA) §237, 8 U.S.C. §1227 13

Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status, 71 Fed. Reg. 27,585 (2006) 12, 13

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Brief in Opposition, *Rosillo-Puga* v. *Holder*, No. 09-1367, *cert. denied*, 131 S. Ct. 502 (2010).....2, 8

Eugene Gressman et al., *Supreme Court Practice* 263 (9th ed. 2007).....2, 3

REPLY BRIEF

The government's brief underscores the need for this Court's review. It does not dispute that the issue presented is important and recurring. Nor does it dispute that Estalita remains eligible to adjust status. Opp. 23 n.7.

Rather, the government asserts that, because the decision below is unpublished, it cannot create a circuit conflict. It spends the bulk of its argument contesting the merits. Finally, it alleges vehicle issues based on events that occurred outside the record and after the decision below.

None of these arguments holds water. This Court frequently reviews unpublished decisions. It often does so where, as here, there is an established circuit conflict and where the court of appeals declared prior published circuit precedent to be binding. The entrenched 2-2-2 circuit split on this issue is recognized by the courts of appeals themselves. The government's disagreement about the merits is a very live dispute that only this Court can resolve. This Court questioned the post-departure bar but expressly left the issue open in *Dada* v. *Mukasey*, 554 U.S. 1, 18-19, 22 (2008). Finally, the vehicle objection slights this Court's remedial authority and misstates the applicable regulatory framework. Further review is warranted.

I. THE CIRCUITS ARE DIVIDED ON WHETHER THE BIA MAY REFUSE TO CONSIDER THE MERITS OF A DEPARTED NONCITIZEN'S FIRST, TIMELY MOTION TO REOPEN OR RECONSIDER

A. This Court Routinely Reviews Unpublished Decisions Implicating Circuit Splits

The government erroneously asserts that because the decision below is unpublished, "there is no precedential decision in the Tenth Circuit addressing timely motions to reopen . . . that could give rise to a circuit conflict warranting this Court's review." Opp. 18. That claim is doubly mistaken.

First, it contradicts the government's recent reading of the Tenth Circuit's precedent. Just three months ago, it acknowledged that a published Tenth Circuit decision had "state[d] its view that the [post-departure bar] would be valid even in the context of a timely motion to reopen." Opp. 21, *Rosillo-Puga* v. *Holder*, No. 09-1367, *cert. denied*, 131 S. Ct. 502 (2010) [*Rosillo-Puga* BIO].

Second, it misstates this Court's practice. "[This] Court grants certiorari to review unpublished and summary decisions with some frequency." Eugene Gressman et al., *Supreme Court Practice* 263 (9th ed. 2007) (collecting citations). In fact, sometimes this Court "view[s] an unpublished or summary decision on a subject over which the courts of appeals have split as signaling a persistent conflict." *Id.*

Non-publication might be relevant only if "the court that rendered the decision may reach a different conclusion in the next case presenting the issue." *Id.* at 506. That is simply not true here. The Tenth Circuit did not view *Rosillo-Puga* as limited to untimely motions. Rather, it expressly held that it was binding precedent in this case, involving a timely motion: "But while the facts in this case may be more sympathetic, *Rosillo-Puga* upheld the very regulation at issue in this case and we are bound by precedent." Pet. App. 6; *see also Contreras-Bocanegra* v. *Holder*, No. 10-9500, 2010 WL 5209228, at *2-*3 (10th Cir. Dec. 23, 2010) (published decision upholding 8 C.F.R. §1003.2(d) and holding "that the timeliness of an alien's motion to reopen is irrelevant to the specific application of the post-departure bar" under *Rosillo-Puga*, and rejecting *Union Pacific* challenge to deference to agency's constriction of its jurisdiction). The Tenth Circuit here presumably did not publish its opinion because it had reached the same holding and denied rehearing en banc twice before. Its position is clear and firmly entrenched.

B. Four Other Circuits' Decisions Conflict with Those of the First and Tenth Circuits and Would Require the BIA to Consider Petitioner's Motion to Reopen

If Estalita's case had arisen in the Fourth or Seventh Circuits, her challenge to the post-departure bar would have succeeded. The same would have been true in the Sixth and Ninth Circuits because she had

been compelled to depart. Only the First Circuit would have joined the Tenth in denying her motion to reopen.

1. The Fourth and Seventh Circuits hold that §1003.2(d)'s post-departure bar cannot defeat the BIA's statutory jurisdiction to consider the merits of a departed noncitizen's motion to reopen. *Marin-Rodriguez* v. *Holder*, 612 F.3d 591, 593-94 (7th Cir. 2010) (Easterbrook, J.) ("[N]othing in [IIRIRA] undergirds a conclusion that the [BIA] lacks 'jurisdiction' – which is to say, adjudicatory competence – to issue decisions that affect the legal rights of departed aliens.") (citation omitted); *William* v. *Gonzales*, 499 F.3d 329, 333 (4th Cir. 2007) ("Congress did not make presence in the United States a prerequisite to filing a motion to reopen."). Here, the Tenth Circuit affirmed the BIA's conclusion that the IJ "lacked jurisdiction" to consider Estalita's motion to reopen. Pet. App. 30. The BIA's refusal to entertain her motion conflicts with *Marin-Rodriguez*'s and *William*'s holdings. If this case had arisen in the Fourth or Seventh Circuit, it would have come out differently.

The government mischaracterizes *Marin-Rodriguez*'s holding by quoting dictum suggesting that "the Board 'may well be entitled to recast its approach' as a claim-processing rule." Opp. 19 (quoting *Marin-Rodriguez*, 612 F.3d at 595). But just as it did here, the BIA in *Marin-Rodriguez* had dismissed the noncitizen's motion to reconsider on jurisdictional grounds. 612 F.3d at 592. Yet the Seventh Circuit granted the petition for review, instead of simply

remanding. *Id.* at 596. Since the BIA below has never "recast its approach," *Marin-Rodriguez*'s holding applies: the BIA cannot "forswear [its] subject-matter jurisdiction" and refuse to adjudicate a departed alien's motion. *Id.* at 595.[1]

The government's effort to distinguish *William* on its facts is also unavailing. Because *William* found that §1003.2(d) "lacks authority and is invalid," it struck down the regulation on its face. 499 F.3d at 334. Indeed, the Fourth Circuit later applied *William* for just that proposition, ignoring any factual differences. *Sadhvani* v. *Holder*, 596 F.3d 180, 183 (4th Cir. 2009) ("In *William I* we held that . . . 8 C.F.R. §1003.2(d), was invalid because it directly contradicted the statutory language in the INA which permitted one motion to reopen with no restriction on the location from which it was filed.").

Moreover, the BIA itself recognizes that *William* "constitutes binding precedent in removal proceedings arising within the jurisdiction of the Fourth Circuit." *Matter of Armendarez-Mendez*, 24 I.&N. Dec. 646, 655 n.7 (BIA 2008). Accordingly, within the Fourth Circuit the BIA no longer relies on the post-departure bar, even in voluntary-departure cases.

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[1] The Second Circuit reads *Marin-Rodriguez* as recognizing a statutory entitlement to have a motion to reopen considered on the merits. *Zhang* v. *Holder*, 617 F.3d 650, 664 (2d Cir. 2010) (noting *Marin-Rodriguez*'s holding that "the Attorney General, by promulgating §1003.2, has improperly 'contract[ed]' the jurisdiction given to the BIA by Congress pursuant to the IIRIRA").

See, e.g., *Matter of Veliz-Payes*, File: A070-569-618 – Baltimore, Md., 2008 WL 4222186 (BIA Aug. 29, 2008) (vacating IJ's dismissal for lack of jurisdiction of a voluntarily-departed noncitizen's motion to reopen).

2. Similarly, the Sixth or Ninth Circuit would have overturned the BIA's decision to dismiss Estalita's motion to reopen on jurisdictional grounds. Both circuits refuse to apply the post-departure bar to noncitizens like Estalita who are compelled to depart.

Thus, the Sixth Circuit held that applying the post-departure bar "regardless of the circumstances of [a noncitizen's] removal" would "perver[t] [] the administrative process." *Madrigal* v. *Holder*, 572 F.3d 239, 245 (6th Cir. 2009). Contrary to the government's intimation, even so-called "voluntary departures" occur in lieu of forcible removal and are not freely chosen, as *Madrigal* recognized. *Compare id.* at 244 n.4 *with* Opp. 8, 20.

The government tries to distinguish *Madrigal* as involving the post-departure bar governing BIA appeals, rather than the version at issue here governing motions to reopen. Both regulations, however, use the same phrase to implement the same rule, providing: "departure from the United States . . . shall constitute a withdrawal" of the pending motion or appeal, as the case may be. 8 C.F.R. §1003.2(d) (motions to reopen or reconsider), §1003.4 (appeals). The courts of appeals thus treat them as "equivalent regulations." *Marin-Rodriguez*, 612 F.3d at 594 (citing *Madrigal*); *see also Coyt* v. *Holder*, 593 F.3d 902, 907 (9th Cir. 2010)

(relying on *Madrigal*'s interpretation of §1003.4 in construing §1003.2(d)).

In the Ninth Circuit, a noncitizen compelled to depart the country may have her motion to reopen adjudicated on the merits if, as here, her removal proceedings have ended. *See Coyt*, 593 F.3d at 907; *Lin* v. *Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007) (holding that post-departure bar does not apply to noncitizens whose removal proceedings have been completed). The Ninth Circuit has never accepted the government's reading of *Coyt* as excluding departures that are "voluntary" in name only, where "the alien could [not] have remained to see the litigation through." *Marin-Rodriguez*, 612 F.3d at 594 (interpreting *Coyt* and *Madrigal*); Pet. 20. Estalita had to leave or she would have faced severe penalties and a conditional removal order the very next day. Her departure was "effectively coerced." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 129 (2007) (holding threat of sanction was coercion, so capitulation to avoid sanction did not deprive federal court of declaratory-judgment jurisdiction); Pet. 21.

3. In contrast, the First Circuit, like the Tenth, would have upheld the dismissal of Estalita's motion. That court expressly upheld the "reasonableness of the Attorney General's interpretation of [IIRIRA] as [it] relate[s] to the reopening issue." *Pena-Muriel* v. *Gonzales*, 489 F.3d 438, 442 (1st Cir. 2007). Pena-Muriel argued that IIRIRA's repeal of the judicial post-departure bar implied a concomitant repeal of the administrative post-departure bar. Though the

government characterizes *Pena-Muriel* as raising a challenge "different from the argument here," Opp. 21-22, they are related theories in support of the same claim. *See, e.g.*, *Rosillo-Puga* v. *Holder*, 580 F.3d 1147, 1167 (10th Cir. 2009) (Lucero, J., dissenting) (advancing this precise theory as part of the same claim), *cert. denied*, 131 S. Ct. 502 (2010). Estalita advances the same argument and claim here. Pet. 28; Opp. 14.

Similarly, the decision below was dictated by *Rosillo-Puga*. There, the Tenth Circuit "uph[e]ld the [post-departure bar] regulations as valid under" IIRIRA. 580 F.3d at 1157. The panel below rejected Estalita's statutory challenge to the regulation because "*Rosillo-Puga* upheld the very regulation at issue and we are bound by precedent." Pet. App. 6. Three months ago, the government acknowledged that the Fourth and Tenth Circuits "disagre[e about] . . . whether the departure bar regulations are valid for timely motions to reopen." *Rosillo-Puga* BIO 21.

In sum, four circuits would have required the BIA to consider the merits of Estalita's motion, while two hold that §1003.2(d) validly deprives the BIA of jurisdiction once noncitizens have departed. This split is entrenched, acknowledged by four courts of appeals, and ripe for this Court's review. Pet. 21-23.

II. THE TENTH CIRCUIT ERRED IN UPHOLDING THE POST-DEPARTURE BAR

1. The government nowhere responds to Estalita's first argument that an agency may not constrict its congressionally conferred jurisdiction, and deserves no deference if it attempts to do so. Pet. 24-25.

2. The government conflates the BIA's mandatory jurisdiction to consider motions to reopen with its discretion to grant relief on the merits. No one disputes that IJs and the BIA exercise adjudicatory discretion on the merits and need not grant relief on all first, timely motions to reopen. Opp. 13. But here, the BIA had already exercised that discretion, granting the motion and remanding to let Estalita pursue adjustment of status. Pet. App. 26. It reversed itself later only because it erroneously concluded that it lacked jurisdiction even to hear the motion on the merits. Pet. App. 30. Since the BIA dismissed for that reason alone, the government cannot now switch arguments to claim that the BIA could have denied the requested relief on the merits. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943); *Marin-Rodriguez*, 612 F.3d at 595. Indeed, the law-of-the-case doctrine may prevent the BIA from doing so now.

3. The statute's text, as well as its structure and enactment history, "guarantees to each alien the right to file 'one motion to reopen'" and have it considered on its merits. *Dada*, 554 U.S. at 15; Pet. 25-27. Though the government denigrates Estalita's seeking "new relief," Opp. 16, Congress authorized

these motions precisely to accommodate "'newly discovered evidence or a change in circumstances since the hearing.'" *Dada*, 554 U.S. at 12. While Congress codified the time, numerical, and new-evidence limits previously contained in regulations, it chose *not* to codify the post-departure bar. *See* Pet. 27; Opp. 4, 13-14. Since the administrative bar was never in the statute but was merely an administrative creation, Congress did not need to repeal it. Furthermore, if Congress expected the administrative post-departure bar to remain in effect, it would not have limited the domestic-violence provision to victims "physically present in the United States," as that bar would already have precluded such motions. 8 U.S.C. §1229a(c)(7)(C)(iv)(IV); Pet. 27; Opp. 14. The administrative post-departure bar, which Congress chose not to adopt, thus conflicts with IIRIRA by taking away a statutorily-mandated right.

III. THIS CASE IS AN IDEAL VEHICLE

The government claims that Estalita is now ineligible for reopening "because her status as an arriving alien means the IJ cannot grant her adjustment of status." Opp. 22; *see also id.* at 12. This argument is a red herring; the government conflates two separate times and statuses. Further, its claim slights this Court's remedial authority and misinterprets the arriving-alien regulation.

1. The government erroneously claims that, because Estalita became an "arriving alien" when she

returned to the country in August 2004, her reentry retroactively converted her into an arriving alien for purposes of her earlier petition and divested the IJ of jurisdiction. Opp. 22-23. The lack of IJ jurisdiction over a hypothetical *new* proceeding has no bearing on whether the IJ or BIA properly disclaimed jurisdiction over her *original* proceeding based on the post-departure bar.

The point of this Court's review would be to answer that question. If this Court agreed with Estalita on the merits, it would restore the status quo ante, returning Estalita to the IJ's jurisdiction to consider her motion on its merits. The government's contrary argument is especially troubling because it bases the IJ's lack of jurisdiction on her departure from this country, which was compelled by the government. *See Madrigal*, 572 F.3d at 245-46 (Kethledge, J., concurring); Pet. 30.

2. Moreover, 8 C.F.R. §1245.2(a)(1)(ii), on which the government relies, would not by its terms preclude an IJ from adjusting Estalita's status. The IJ in the original case would lack jurisdiction over any motions in new removal proceedings that might arise out of her August 2004 re-entry. But that is irrelevant to his jurisdiction to hear her July 2004 motion to reopen and adjust status as part of her original removal proceedings. Not only *can* the IJ adjudicate Estalita's application to adjust status, but *only* he can do so. The regulation states: "In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien),

the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate *any* application for adjustment of status the alien may file." 8 C.F.R. §1245.2(a)(1)(i) (emphasis added).

The government does not claim that Estalita was an "arriving alien" when DHS "charged [her] with being removable" in April 2001. Opp. 6. Rather, it claims that she entered as an "arriving alien" the second time, in August 2004, over three years after the removal proceedings began. *Id.* at 8-9. In 2001, she was not "placed . . . in removal proceedings . . . as an arriving alien." 8 C.F.R. §1245.2(a)(1)(i). Thus, the IJ who oversaw the removal proceedings has "exclusive jurisdiction to adjudicate any application for adjustment of status." *Id.*

The government incorrectly seeks to shoehorn Estalita into §1245.2(a)(1)(ii), which gives U.S. Citizenship and Immigration Services (USCIS) authority to adjudicate adjustment-of-status applications in entirely different circumstances.[2] According to the agencies that promulgated that provision, it applies to an "arriving alien who was paroled and *thereafter* placed in removal proceedings." Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for

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[2] The only case cited by the government is inapposite. In *Matter of Yauri*, the noncitizen conceded that she fell squarely within the scope of 8 C.F.R. §1245.2(a)(1)(ii) and that USCIS was thus responsible for adjudicating her application to adjust status. 25 I.&N. Dec. 103, 104 (2009).

Adjustment of Status, 71 Fed. Reg. 27,585, 27,588 (2006) (emphasis added). Estalita was placed in removal proceedings in 2001, long before she re-entered in August 2004 as a parolee. We cannot find in the record any notice of removal or notice to appear commencing new removal proceedings against her after August 2004, and the government does not claim otherwise. Thus, §1245.2(a)(1)(ii) does not apply, and the IJ retains jurisdiction.

The government's position conflicts with its long-standing practice under predecessor regulations. Before IIRIRA created the all-purpose term "removal," noncitizens could be either "deported" if they had already entered the United States, or "excluded" if denied admission at the border. *Id.* at 27,586-87. IJs had authority over applications to adjust status filed by noncitizens who were in deportation proceedings under INA §237 but not those filed by noncitizens in exclusion proceedings under §212. *See, e.g.*, *Matter of Manneh*, 16 I.&N. Dec. 272, 274 (1977). Estalita's proceeding was under §237, not §212.

New regulations promulgated in 2006 changed the terminology but retained this basic distinction. *See* 71 Fed. Reg. 27,587-88. When a noncitizen faces the equivalent of exclusion, that is, removal under §212 after having been paroled but not admitted into the United States, an IJ should not adjudicate an adjustment-of-status application. The only removal proceedings here, however, are §237 proceedings, the equivalent of deportation, commenced after Estalita was properly admitted in 2000. Thus, the IJ retains

jurisdiction. *See, e.g.*, *Matter of Roussis*, 18 I.&N. Dec. 256, 257 (1982).

CONCLUSION

For the foregoing reasons, as well as the reasons stated in the petition, this Court should grant the petition.

Respectfully submitted,

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December 28, 2010